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Lay representative for Temple of Lono

BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAII

IN THE MATTER OF) Case No. BLNR-CC-16-002
)
A Contested Case Hearing Re Conservation) **OPENING STATEMENT FROM**
District Use Permit (CDUP) (HA-3568 for) **THE TEMPLE OF LONO**
The Thirty Meter Telescope at the Mauna)
Kea Science Reserve, Kaohe Mauka,)
Hamakua District, Island of Hawai'i,)
TMK (3) 4-4-015:009)
_____)

OPENING STATEMENT FROM THE TEMPLE OF LONO

The question in this proceeding is whether the Board of Land and Natural Resources should grant a permit application for a Conservation District Use Permit.

The Applicant for the permit is the University of Hawai'i at Hilo, a State of Hawai'i institution.

The permit is to build an 18-story telescope, known as the Thirty Meter Telescope or TMT, on the summit of Mauna Kea on the Island of Hawai'i.

The answer to the question was supposed to come from a contested case in which all parties would have the opportunity for a fair and impartial proceeding presided over by a Hearing Officer appointed by the Board of Land and Natural Resources.

The broader context of this contested case is that the Board already held a contested case hearing on the same application. That case resulted in a recommendation from a hearing officer that the application be granted.

The Board granted the application.

Litigation ensued that resulted in a decision by the Hawai'i Supreme Court that vacated the permit. The decision was based on the Board having voted to grant the permit and then holding a contested case providing the first opportunity for those opposed to the permit to be heard. The Supreme Court found this "cart before the horse" approach to be a clear violation of the Due Process rights of those who never had an opportunity to be heard prior to the Board's vote.

The matter returned to the Board for further consideration.

The Board promptly initiated a new contested case and hired a hearing officer.

The hearing officer conducted a pre-hearing process to prepare for the Contested Case Hearing.

The initial inquiry expected in this case would have focused on whether the Application met the legal criteria for granting a permit in a conservation use district. HAR §13-5-30(c) and other applicable rules. Other issues would have included whether the proposed land use satisfied the requirements to protect Native Hawaiian rights found in Article XII, §7 of the Hawai'i State Constitution; the requirements of *Ka Pa'akai O Ka 'Āna v. Land Use Comm'n State of Hawai'i*, 94 Hawai'i 31, 7 P.3d 1068 (2000); and related requirements, such as those found in Article XI, §1 of the Hawai'i State Constitution and the public trust doctrine.

Those initial expectations, however, have been overshadowed by the conduct of this proceeding. The record is now filled with rulings demonstrating that this proceeding is not a fair and impartial adjudication. The Hearing Officer acts to

protect the Applicant from any adverse challenge. She rejected almost every motion filed by parties opposed to the telescope, refused to issue written decisions in a timely fashion, refused to provide written reasonable explanations for oral rulings, jammed a very burdensome schedule down on *pro se* parties, and otherwise demonstrated a clear bias in favor of the Applicant and against those contesting the application. She also ignored a motion filed to recuse her, along with other motions raising potentially fatal challenges to the permit application.

While many of these abuses affect all the parties contesting the application, the Temple of Lono has been singled out for particularly harsh treatment. That focus by the Hearing Officer means that, for the Temple of Lono, the overriding issue is the application of Article XII, §7 of the Hawai'i Constitution. The record related to that issue is already dispositive of the question in the contested case.

Article XII, §7 states:

TRADITIONAL AND CUSTOMARY RIGHTS

Section 7. The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights. [Add Const Con 1978 and election Nov 7, 1978]

During the pre-hearing process, the Applicant chose to launch a libelous attack on the Temple of Lono.

The Temple responded with a motion to dismiss the application in this case. The Temple argued that the State cannot grant a permit to an applicant whose project will impact Native Hawaiian customary and traditional rights, including

religious rights, if that Applicant has demonstrated a disdain for, disrespect for, and condemnation of the traditional Hawaiian Faith, which the Temple represents.

The Temple further argued that granting a permit to such an Applicant would violate the Constitutional protections guaranteed to Native Hawaiians.

Because the Applicant's attack came after the arbitrary schedule set by the Hearing Officer for pre-filed motions had expired, the Temple filed a motion requesting permission to file a motion out of time that would seek to dismiss the application in this case based on that attack.

The Hearing Officer refused to allow the Temple to file the motion to dismiss.

That ruling had six implications:

(1) The Temple does not have a due process right in this proceeding to have matters heard that are substantive and relevant to the decision to be made in this proceeding.

(2) The Hearing Officer is comfortable with the Applicant engaging in a bigoted and hateful attack on another party, particularly if the target is the Temple of Lono.

(3) The Hearing Office was essentially deciding the disqualification issue by a capricious and arbitrary procedural ruling that precluded the Temple from being heard – the very same Due Process violation that led to the earlier Supreme Court ruling the vacating the original permit granted in this case.

(4) The Temple should expect prejudicial rulings on any other matters the Temple wishes to raise.

(5) The granting of intervenor status to the Temple was a Due Process “bait and switch” in which the participation of intervenors would legitimize the proceeding when, in fact, the Hearing Officer had no intention of permitting that participation to be substantive or comprehensive.

(6) The permit application is predetermined to receive a recommendation for approval, no matter what takes place in the contested case.

Based on these implications, the Temple filed a motion to recuse the Hearing Officer.

The Hearing Officer ignored the motion.

In one final effort to have the matter of the disqualifying attack addressed, the Temple identified the Applicant’s disqualifying character as an issue to be considered in the Contested Case Hearing.

The Hearing Officer excluded that issue from the issues to be heard.

Denying that final opportunity for doing the right thing does not mean that the issue will not arise precisely because the application of Article XII, §7 is an acknowledged issue. The fact that the Hearing Officer refused for a third time to acknowledge the legitimacy of the Temple’s concerns and the Temple’s right to be heard, however, only solidified the case for this proceeding being irrevocably flawed with Due Process violations and presided over by a biased adjudicator.

In order to avoid any unnecessary expenditure of time and resources, the Temple decided to have only one witness and make any further case through cross-examination as appropriate to the issues of concern to the Temple.